From: "Mike Updike" <maddog4406@live.com>
To: <ADMcomment@courts.mi.gov>
Date: 3/25/2015 12:46 PM
Subject: ADM File No. 2014-09

Dear sir or madam:

First of all, I fully understand and respect the views of certain members of the Court of Appeals concerning the use of unpublished opinions in appellate briefs. I present the following solely from the perspective of a retired lawyer who primarily, but not exclusively, practiced in Michigan's appellate courts for thirty years (1979-2009).

1. The proposed rule may have the effect of having the Court of Appeals and its staff spend less time on appeals where it is unlikely a published opinion will be involved. Very few litigants pursue an appeal because they want a published opinion, but almost all of them pursue an appeal because they want to be, at the very least, fairly heard and their position given serious consideration.

2. The problem is magnified by the comparative ease today by which unpublished opinions can be discovered and read. A body of law could emerge that has a definitive rule on a particular issue—but cannot be cited as precedent because it is contained in unpublished decisions and thus seems to be restricted to the favored few. This may compromise the view of the Court of Appeals (and the Supreme Court, for that matter) as a dispenser of justice and the corrector of errors.

3. The current MCR 7.215 makes it very clear that unpublished opinions are not to be cited as precedent, and that is acceptable (although in this day and age perhaps all opinions should be deemed published because, as a practical matter, they're far more available than they were 30 or even 20 years ago). Further, reasonable men and women of good will can disagree as to the relevancy of a given opinion (I believe that's called advocacy), and advocacy should not be discouraged, which warning that certain kinds of unpublished opinions will be regarded with "disfavor" will certainly do. No one who practices in the Court of Appeals or the Supreme Court would ever want to get a reputation as someone who engaged in a "disfavored" activity.

4. Before the advent of computers, scanners, the internet and the like, there was legitimate concern that unpublished opinions constituted a body of "hidden law" that was available to the very few—i.e., large law firms and corporations who could send staff to the Court of Appeals and have them digest and brief unpublished opinions and "cherry pick" those that helped a case or a particular practice area. Now unpublished opinions are basically available to anyone for little or no cost and we want to further restrict their use. Shouldn't this proposed rule—ADM File No. 2014-09--have been in force when unpublished opinions were both difficult and expensive to obtain?

5. I concur completely, for all intents and purposes, with the comments of Justice Markman on ADM File. No. 2014-9. Clarification of certain parts of MCR 7.215 as he suggests are certainly unobjectionable and, indeed, very worthwhile. I would also respectfully refer the reader to the comments made by former Chief Judge Whitbeck, as quoted in Michigan Lawyer's Weekly, about the merits and use of unpublished opinions in deciding cases. I regret that I am unable to provide an exact cite for former Chief Judge Whitbeck's comments in Michigan Lawyer's Weekly, but will be happy to track it down upon request.

6. It is only logical that if an unpublished opinion has some chance of being presented to the Court of Appeals or the Supreme Court that it will be better researched and reasoned than one that has a lesser chance. If the proposed change to MCR 7.215 is adopted, the odds are high that unpublished opinions will be cited less frequently than today, and that will almost inevitably affect the quality of such opinions.

Very truly yours,

MICHAEL L. UPDIKE

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